

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63113-6-I
Respondent/Cross Appellant,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
PATRICK CLARENCE TOLLEFSON,)	
)	
Appellant/Cross Respondent.)	FILED: June 14, 2010
)	

Appelwick, J. — Tollefson was convicted by a jury of attempted first degree robbery and attempted first degree burglary. Tollefson's challenge to his consecutive firearm sentence enhancements has been resolved by our Supreme Court, but we accept the State's concession that remand is required to correct a scrivener's error Tollefson identified in his judgment and sentence. We reject the State's cross-appeal of Tollefson's sentence because the trial court correctly ruled that the burglary antimerger statute applies only to sentences for the completed crime of burglary. We accordingly affirm Tollefson's sentence, but remand to correct the scrivener's error.

FACTS

Todd Moon heard his driveway alarm go off in the early morning hours of June 4, 2008. He went outside to investigate and he saw an unfamiliar Jeep Cherokee in his driveway. When Moon saw a man get out of the vehicle and point a gun at him, he jumped inside his front door. Four bullets came through the door. Moon called police.

Officers located the Cherokee nearby and arrested the occupants. Patrick Tollefson was one of two passengers. Police located a firearm that had been thrown

from the vehicle. A firearms examiner later determined that shell casings in Moon's driveway matched the firearm, and DNA evidence suggested that Tollefson had held or fired the weapon.

The State charged Tollefson with one count each of first degree assault, attempted first degree burglary, and attempted first degree robbery. The jury acquitted Tollefson of the assault charge, convicted him of the attempted burglary and attempted robbery charges, and found that he had been armed with a firearm during both of those offenses.

At sentencing, the trial court determined that the attempted burglary and attempted robbery charges constituted the same criminal conduct. The court therefore did not include either offense in the calculation of the offender score for the other. The court rejected the State's argument that it could rely on the burglary antimerger statute to sentence Tollefson separately for each offense notwithstanding they were the same criminal conduct. The court did, however, sentence Tollefson to serve the firearm enhancements consecutively to his prison term for the substantive offenses and consecutively to each other. Although the court determined that Tollefson's offender score was zero, and applied a sentencing range consistent with that determination, the judgment and sentence recites that Tollefson had an offender score of two.

Tollefson appeals, and the State cross-appeals.

DISCUSSION

Tollefson first contends that his judgment and sentence erroneously recites an offender score of two for his attempted burglary and attempted robbery offenses when the trial court correctly determined that the score was zero. The State concedes that

the offender score recited in the judgment and sentence does not match the standard range the court employed and that remand is therefore required. We accept the concession. Accordingly, the case is remanded for correction of the error.

Tollefson next argues that the trial court violated double jeopardy by subjecting him to multiple consecutive firearm enhancements. His argument in this regard, however, has now been resolved in favor of the State by our State Supreme Court in State v. Mandanas, 168 Wn.2d 84, 86, 228 P.3d 13 (2010).

In its cross-appeal, the State contends that the trial court erred as a matter of law by concluding that because the attempted burglary and attempted robbery offenses were the same criminal conduct, it was required to count those offenses as one crime in determining the applicable standard range under RCW 9.94A.589(1)(a). The State argues that under State v. Lessley, 118 Wn.2d 773, 781–82, 827 P.2d 996 (1992), and RCW 9.94A.525(4), the trial court actually had discretion to count the attempted burglary and attempted robbery sentences separately. The State therefore maintains that the trial court abused its discretion by applying the wrong legal standard. See State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). We disagree.

Under the general rule in RCW 9.94A.589(1)(a), “Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” Under the same criminal conduct provision in RCW 9.94A.589(1)(a), however, the current offenses count as one crime “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct.” Multiple offenses encompass the same criminal conduct

when they involve the same (1) objective criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a).

The State does not dispute that the trial court correctly determined that Tollefson's two offenses constituted the same criminal conduct. The State contends, however, that an exception to RCW 9.94A.589(1)(a) applies here under Lessley, because Tollefson's offenses included an attempted burglary.

The burglary antimerger statute, RCW 9A.52.050, provides that "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary." In Lessley, our Supreme Court held that when one of a defendant's current offenses is burglary, the burglary antimerger statute allows the "sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct." 118 Wn.2d at 781. The State invites us to extend the rule of Lessley to the present circumstances, where Tollefson was convicted of attempted burglary, because RCW 9.94A.525(4) provides that a sentencing court is to "[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses."

Reviewing the rationale for the holding in Lessley persuades us that the State's position is not well taken. In Lessley, the Supreme Court reasoned that there was a conflict between the plain language of the burglary antimerger statute, which provided for separate punishment for burglaries, and the provision now contained in RCW 9.94A.589(1)(a), which does not provide for additional punishment for the "same criminal conduct." 118 Wn.2d at 781. The Lessley court applied rules of construction

to harmonize the statutes rather than find that the antimerger statute had been implicitly repealed, and to allow the more specific antimerger statute to control over the more general sentencing statute. Id. at 780–82; see also State v. Roose, 90 Wn. App. 513, 517, 957 P.2d 232 (1998) (analyzing Lessley). The court held that the antimerger statute gives the sentencing judge discretion to punish a burglary even where it and an additional crime encompass the same criminal conduct. Lessley, 118 Wn.2d at 781–82.

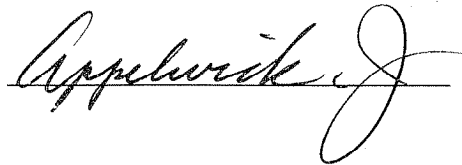
Here, unlike in Lessley, there is no conflict between statutes that requires harmonizing. As Tollefson argues, the plain language of the antimerger statute applies only to completed burglary offenses, not to attempt offenses, so there is no conflict between the antimerger statute and the same criminal conduct statute. While the State also cites RCW 9.94A.525(4), which does apply to attempt offenses, that statute governs the determination of how many points are to be assigned to an offense when the offense is counted in calculating an offender score. See State v. Knight, 134 Wn. App. 103, 106–109, 138 P.3d 1114 (2006), aff'd on other grounds, 162 Wn.2d 806, 174 P.3d 1167 (2008) (conspiracy to commit robbery scores as two points rather than one against another current violent offense, because a completed robbery would score as two points). The issue here, however, is whether Tollefson's attempted burglary offense could be counted as a separate crime at all because it is the same criminal conduct as his attempted robbery offense, not how many points to assign to it if it was properly included in an offender score calculation.¹ Accordingly, there is no conflict

¹ We note, moreover, that in the overall sentencing scheme of the Sentencing Reform Act, attempt offenses are not equated for all purposes with completed offenses. See RCW 9.94A.595 (sentence range for an anticipatory offense is 75 percent of the

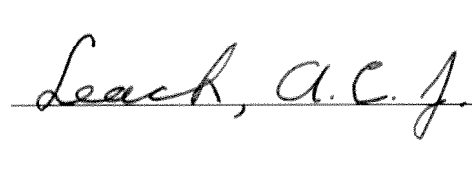
between any of the statutes involved here requiring resort to any rules of construction that could justify reaching the result the State urges.

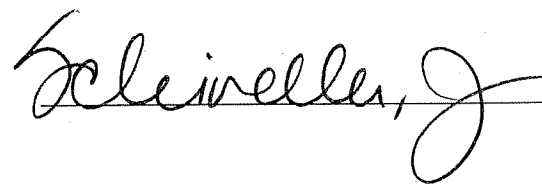
Under the plain language of the statutes, the trial court correctly determined that the burglary antimerger statute had no effect on the determination of the proper sentence for Tollefson's attempted burglary conviction.

We affirm Tollefson's sentence, and remand only for correction of the scrivener's error as to the proper calculation of his offender score.

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WE CONCUR:

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sentence range for the completed offense).